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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAUL VELASQUEZ, FAVIOLA ALVAREZ,) Case No. 08-4592 SC
9 MARCELO ALTAMIRANO, JACKY WILSON)
10 II, CARLOS MARTINEZ AND DIONICIO) ORDER DENYING MOTION
MARTINEZ, on behalf of themselves) FOR CONDITIONAL
and all others similarly situated,) CERTIFICATION
11)
12 Plaintiffs,)
13)
14 v.)
15)
16 HSBC FINANCE CORPORATION; HOUSEHOLD)
FINANCE CORPORATION; BENEFICIAL)
COMPANY, LLC,)
17)
Defendant.)
18)
19 _____)

I. INTRODUCTION

19 This matter comes before the Court on the Motion for (1)
20 Conditional Certification; (2) Court-Authorized Notice; and (3)
21 Production of Names and Addresses filed by Plaintiffs Marcelo
22 Altamirano ("Altamirano") and Jackey Wilson II ("Wilson")
23 (collectively "Plaintiffs"). Docket No. 75. Defendants HSBC
24 Finance Corporation and Beneficial Company LLC (collectively
25 "Defendants") filed an Opposition. Docket No. 94. Plaintiffs
26 submitted a Reply. Docket No. 104. For the following reasons,
27 the Court DENIES Plaintiffs' Motion.

1 **II. BACKGROUND**

2 On November 18, 2008, Plaintiffs, on behalf of themselves and
3 all others similarly situated, filed an Amended Complaint. Docket
4 No. 22 ("Am. Compl."). It contains ten counts, including (1)
5 failure to pay overtime compensation in violation of the Fair
6 Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.; (2) failure
7 to pay the federal minimum wage in violation of the FLSA; (3)
8 failure to pay the California minimum wage in violation of Cal.
9 Code Regs. tit. 8, § 11000; and (4) failure to pay overtime
10 compensation in violation of Cal. Code Regs. tit. 8, § 11040, and
11 Cal. Labor Code § 510(a). *Id.* ¶¶ 58-82.

12 Plaintiffs are former Account Executives ("AEs"). AEs
13 marketed and/or sold mortgages, insurance, home-equity loans, auto
14 loans and/or other financial products and services. *Id.* ¶ 3; see also
15 Biela Decl. Ex. A ("Maureen Gillan-Myer Dep.") at 22:9-24,
16 Ex. G ("Account Executive Job Description").¹ Plaintiffs'
17 proposed class period runs from October 2, 2005 through March 31,
18 2009. Docket No. 76 ("Mem. of P. & A") at 1. It runs until the
19 end of March 2009, because Defendants' entire consumer lending
20 branch network was closed at that time. Biela Decl. Ex. B
21 ("Michael Robert Fitzpatrick") at 36:1-2.² During this period,
22 Plaintiffs employed approximately 2100 AEs in California, and 8700
23

24 ¹ Robert W. Biela, attorney for Plaintiffs, filed a
25 Declaration in Support of the Motion for Conditional Certification.
26 Docket No. 76-1. Maureen Gillan-Myer ("Gillan-Myer") is currently
27 the Senior Vice President of Human Resources at HSBC.

2 ² Michael Robert Fitzpatrick ("Fitzpatrick") is one of
28 Defendants' 30(b)(6) corporate designees.

1 AEs outside of California.³ Biela Decl. Ex. C ("Defs.' Resps. to
2 Pls.' Interrogs.") at 17. Plaintiffs allege that they were
3 required to work overtime hours "off-the-clock" in violation of
4 the FLSA. Mem. of P. & A at 2. Plaintiffs seek to conditionally
5 certify this case as a collective action so that notice can be
6 sent to all putative members. Id.

7

8 **III. LEGAL STANDARD**

9 The FLSA provides employees with a private right of action to
10 sue an employer for violations of the Act on behalf of "themselves
11 and other employees similarly situated." 29 U.S.C. § 216(b). The
12 FLSA does not define "similarly situated," and the Ninth Circuit
13 has not spoken to the issue. The Supreme Court, in Hoffmann-La
14 Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989), left the term
15 undefined.⁴ However, the Supreme Court indicated that a proper
16 collective action encourages judicial efficiency by addressing in
17 a single proceeding claims of multiple plaintiffs who share
18 "common issues of law and fact arising from the same alleged
19 [prohibited] activity." Id.

20 A majority of courts, including district courts in the Ninth
21 Circuit, have adopted an ad hoc, two-tiered, case-by-case approach
22 for actions brought under the FLSA. See, e.g., Thiessen v. Gen.
23 Elec. Capital Corp., 267 F.3d 1095, 1102-03 (10th Cir. 2001); Hipp

24
25 ³ The number of California AEs is for the time period October
26 2, 2004 to March 31, 2009.

26 ⁴ Hoffmann-La Roche addressed a collective action brought
27 under the Age Discrimination in Employment Act, which, the Court
recognized, incorporates § 16(b) of the FLSA. 493 U.S. at 170.

v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001); Kress v. PricewaterhouseCoopers, LLP, --- F.R.D. ----, No. 08-0965, 2009 WL 4269465, at *3 (E.D. Cal. Nov. 25, 2009); Lewis v. Wells Fargo & Co., --- F. Supp. 2d ----, No. 08-2670, 2009 WL 3517660, at *2 (N.D. Cal. Oct. 26, 2009); Gerlach v. Wells Fargo & Co., No. 05-0585, 2006 WL 824652, at *2-3 (N.D. Cal. Mar. 28, 2006); Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004). Determining whether a collective action is appropriate is within the discretion of the district court. Leuthold, 224 F.R.D. at 466.

The first tier is the "notice stage," which asks whether the employees are sufficiently similarly situated such that notice should be sent to prospective plaintiffs giving them the opportunity to "opt in." See Kress, 2009 WL 4269465, at *3. "[T]he court requires little more than substantial allegations, supported by declarations or discovery, that 'putative class members were together the victims of a single decision, policy, or plan.'" Gerlach v. Wells Fargo & Co., No. 05-0585, 2006 WL 824652, at *2-3 (N.D. Cal. Mar. 28, 2006) (quoting Thiessen, 267 F.3d at 1102-03). The "notice stage" determination is made under a fairly lenient standard and typically results in conditional certification. Leuthold, 224 F.R.D. at 467. However, unsupported assertions of FLSA violations are not sufficient to meet Plaintiff's burden. Ellerd v. County of Los Angeles, No. 08-4289, 2009 WL 982077, *3 (C.D. Cal. Apr. 9, 2009) (quoting Edwards v. City of Long Beach, 467 F. Supp. 2d 986, 990 (C.D. Cal. 2006)).

If a court grants conditional certification, then it engages

1 in a more searching review at the second stage when discovery is
2 complete and the case is ready for trial. See Leuthold, 224
3 F.R.D. at 467. The second-tier analysis is generally triggered by
4 a motion to decertify. Id.

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6 **IV. DISCUSSION**

7 **A. Evidentiary Objections and Motion to Strike**

8 In response to the evidence submitted in support of
9 Plaintiffs' Motion for Conditional Certification, Defendants filed
10 forty-six pages of evidentiary objections. Docket No. 97
11 ("Evidentiary Objections"). Many of these objections are entirely
12 frivolous. For example, Defendants object to the authenticity and
13 admissibility of their own responses to Plaintiffs'
14 interrogatories, and to documents that they themselves produced in
15 discovery. See Evidentiary Objections at 2, 7-12. Even taking
16 Plaintiffs' submitted evidence into account, the Court finds that
17 Plaintiffs are not entitled to have this case conditionally
18 certified. Therefore, it is not necessary for the Court to issue
19 rulings regarding Defendants' evidentiary objections.

20 Defendants also move to strike the deposition testimony of
21 Paul Velasquez ("Velasquez"). See Docket No. 96 ("Mot. to
22 Strike"). On July 15, 2009, Velasquez and Faviola Alvarez
23 ("Alvarez") stipulated to the voluntary dismissal of their claims
24 against Defendants with prejudice. Docket No. 52. Velasquez's
25 employment with Defendants ended in February, 2005, Musolino Decl.

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¶ 19, Ex. A. ("Velasquez Dep.") at 68:15-69:22,⁵ which is more than three years before Plaintiffs filed their Complaint in this case on October 2, 2008. As such, Defendants contend his testimony is irrelevant and inadmissible. Mot. to Strike at 2-3. Defendants also contend that because his dismissal operated as an adjudication on the merits, Plaintiffs should not be able to use his testimony to support their position. Id. at 4.

Relevant evidence is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The Court finds that Velasquez's testimony concerning his experiences as an AE is probative, although less probative than the testimony of AEs employed since October 2, 2005. Therefore, his testimony is admissible. Also, even though his dismissal operates as an adjudication on the merits, Plaintiffs can still rely on his testimony to corroborate the testimony and declarations of AEs who are putative members of this collective action. The Court DENIES Defendants' Motion to Strike Velasquez's testimony.

B. First-Tier Analysis Applies

The Court begins by addressing Defendants' contention that the Court should apply the stricter second-tier analysis. Opp'n at 22. According to Defendants, significant discovery has occurred in this case. Id. Defendants have produced over 11,000 pages of documents, and taken eight depositions. Musolino Decl.

⁵ Regina A. Musolino, a partner at Seyfarth Shaw LLP, filed a Declaration in Support of Defendants' Opposition. Docket No. 95.

¶ 35. According to Defendants, Plaintiffs have deposed four former District Sales Managers ("DSMs") and taken seven 30(b)(6) depositions. *Id.* According to Plaintiffs, only two 30(b)(6) depositions have been conducted. Reply at 4.

Even if seven 30(b)(6) depositions have occurred, it is clear that discovery is far from complete. The second-tier analysis usually occurs "[o]nce discovery is complete and the case is ready to be tried." Leuthold, 224 F.R.D. at 467. "Courts within this circuit refuse to depart from the notice stage analysis prior to the close of discovery." Kress, 2009 WL 4269465, at *4. This Court follows the majority of district courts within this Circuit and applies the first-tier, or notice stage, analysis.

C. Plaintiffs Have Not Shown They Are Similarly Situated

When plaintiffs allege that employers have violated the FLSA by failing to pay overtime compensation, the case is typically either a "misclassification" case, where the allegation is that the employer improperly classified the employee as exempt from overtime compensation, or an "off-the-clock" case, where the allegation is that the employer failed to pay overtime compensation to non-exempt, hourly, employees. In misclassification cases, it is often easier to show the plaintiffs were the victims of a single decision, policy, or plan. Compare Kress, 2009 WL 4269465, at *6 ("Taken literally, this [notice stage] standard might allow plaintiffs to receive conditional certification solely on the basis . . . [of] an employer's uniform classification decision.") with Castle v. Wells Fargo Fin., Inc., No. 06-4347, 2008 WL 495705, at *2-5 (N.D. Cal. Feb. 20, 2008)

1 (denying conditional certification where plaintiffs alleged they
2 had been denied overtime pay for "off-the-clock" hours worked
3 under variety of different circumstances, and where plaintiffs
4 failed to identify company-wide policy or practice).

5 This case is an "off-the-clock" case. See Mem. of P. & A. at
6 2. From 2004 through 2009, AEs were classified as non-exempt
7 employees. Gillan-Myer Dep. at 17:20-22. Plaintiffs' motion for
8 conditional certification relies upon two theories. First, they
9 allege that Defendants set sales targets for AEs that required AEs
10 to work off-the-clock so as to meet those targets. Mem. of P. &
11 A. at 5-8. Second, Plaintiffs allege that branch managers,
12 district managers, and regional managers were "incentivized" to
13 control overtime expenses such that AEs had to work off-the-clock.
14 Id. at 8-14. According to Plaintiffs, they have "submitted
15 declarations and testimony from putative Class members and former
16 Account Executives who attest to being victims of Defendants'
17 unwritten policies and practices which required the employees to
18 meet mandatory sales targets while keeping overtime expenses to an
19 unrealistic minimum." Reply at 9. The Court addresses each
20 theory in turn.

21 **1. Sales Targets**

22 The evidence submitted to the Court indicates that Defendants
23 set "new money goals" which were performance targets for AEs and
24 branch managers. Biela Decl. Ex. F ("Barden Dep.") at 18:15-22,⁶
25 Ex. S ("2007 Compensation Plan"), Ex. T ("2008 Incentive

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27 ⁶ Jeffrey Scott Barden ("Barden") is one of Defendants'
30(b)(6) corporate designees. See Mot. at 10-11.

1 Compensation Plan"). According to Barden:

2 New Money is the incremental amount of new
3 dollars that come into the business from
4 originating a loan, so depending on what part of
5 the country that you're in, what's the average
6 loan size for that part of the country, and
7 based on the unit production expected of that
8 part of the country , you would be assigned a
New Money goal Each branch went through
an evaluation process, depending on, you know,
where they were, what their history had been,
what was going on in their economic environment
to determine what their opportunity was which
plugged directly into the New Money goal.

9 Barden Dep. at 18:23-19:17. By the end of 2008, Defendants had
10 approximately 800 branches operating in about 80 districts.

11 Fitzpatrick Dep. at 31:21-32:4. Barden's testimony indicates that
12 the sales targets of AEs differed depending on the location, and
13 changed over time, which undercuts the inference that these
14 targets were the basis of a common policy or practice which forced
15 AEs throughout the country to work overtime without compensation.
16 Determining which sales targets required which AEs to work
17 overtime without compensation would require individualized
18 determinations.

19 According to Plaintiffs, these performance targets forced AEs
20 to work overtime hours without compensation in order to preserve
21 their jobs. Mem. of P. & A. at 7. In support of this contention,
22 Plaintiffs rely on the deposition testimony of five former AEs,
23 and the declarations of six former AEs. In the declarations
24 submitted by Plaintiffs, six former AEs state that they were
25 required to meet a "pre-determined sales quota" each month, and
26 that they regularly had to work more than forty hours without
27 compensation in order to meet these sales quotas. Biela Decl. Ex.

1 M ("Carney Decl.") ¶¶ 3-4, Ex. N ("Carson Decl.") ¶¶ 3-4, Ex. O
2 ("Griffiths Decl.") ¶¶ 3-4, Ex. P ("Klingensmith Decl.") ¶¶ 3-4,
3 Ex. Q ("Martin Decl.") ¶¶ 3-4, Ex. R ("Walters Decl.") ¶¶ 3-4.

4 In response, Defendants have submitted eighty-three
5 declarations from employees, most of whom are Branch Sales
6 Managers ("BSMs"), and all of whom claim they never required AEs
7 to work off-the-clock. See App. of Evidence in Support of Defs.'
8 Opp'n Ex. P ("Decls. in Support of Opp'n"). Approximately
9 nineteen of these employees served as AEs, or Senior Account
10 Executives ("SAEs"), and they claim that when employed in those
11 positions they did not work off-the-clock. See Decls. in Support
12 of Opp'n. While Plaintiffs question the validity and accuracy of
13 these declarations, see Reply at 4 n.5, they suggest the
14 experiences of Carney, Carson, Griffiths, Klingensmith, Martin,
15 and Walters were not the result of a company-wide policy or plan.

16 Plaintiffs also rely on the deposition testimony of five
17 former AEs. According to the testimony of Velasquez, his branch
18 manager never told him to work outside of office hours, but
19 "insinuated" that he should generate his own sales leads outside
20 of work. Biela Decl. Ex. K ("Velasquez Dep.") at 43:7-44:22.
21 Velasquez did not notify his branch manager that he was generating
22 leads after office hours. Id. at 44:23-45:1. According to
23 Velasquez, he worked late two nights a week, and if he was not
24 making his goals, he had to extend that to an extra night. Id. at
25 86:12-18. He testified that branch managers would cut back his
26 requested hours if the district manager sent out emails saying no
27 overtime was allowed. Id. at 92:8-25.

1 According to Alvarez, she worked after she had clocked out
2 approximately three or four times. Biela Decl. Ex. L ("Alvarez
3 Dep.") at 39:1-11. In response to a question about whether anyone
4 told her she had to continue to work after she had clocked out,
5 she responded: "I want to say they didn't give me that impression,
6 but I had to continue to work. . . . I couldn't leave . . .
7 things unfinished" Id. at 39:23-40:3. Alvarez told
8 managers twice that she had work to finish after she clocked out,
9 and they responded that it didn't matter. Id. at 40:4-16.

10 David Almazan ("Almazan") worked in the Cerritos and Buena
11 Park branches of HSBC. Biela Decl. Ex. J ("Almazan Dep.") at
12 51:15, 75:6-10. Almazan testified that not everyone worked
13 outside of their scheduled hours, id. at 73:20, but for those who
14 did "there was an unwritten rule or kind of understanding that if
15 you had too much overtime for one reason or another that you
16 showed up on the company radar." Id. at 74:6-9, 158:10-14.
17 Almazan acquired this understanding from his colleagues, not from
18 management. Id. at 74:14-18. Almazan sometimes had to use his
19 cell phone outside of work to call a customer, he sometimes had to
20 stay late at the end of the month to complete a loan deal, and
21 once or twice a month he worked weekends without recording his
22 time. Id. at 78:2-19. Almazan testified that, although he does
23 not recall specific conversations, branch sales managers and
24 district sales managers "conveyed" to AEs that it was frowned upon
25 to have too much overtime. Id. at 155:3-25. He testified that if
26 he was still on the phone with a customer at 7:00 p.m., he had to
27 continue the phone call "because that's how I made my living was

1 by booking loans. I mean, I had to do what I had to do to get the
2 job done. If it was five minutes later, 30 minutes later. I
3 mean, ultimately my hourly [pay] was measly compared to the bonus
4 that was potentially made, so you did what had to be done." Id.
5 at 158:20-159:5. He does not recall any branch manager
6 specifically having an issue with the amount of overtime he was
7 recording. Id. at 159:7-12.

8 Marcelo Altamirano ("Altamirano") worked as an AE at the
9 Fullerton branch. Biela Decl. Ex. H ("Altamirano Dep.") at 78:1-
10 6. Altamirano recalls being told by a supervisor that AEs were
11 not supposed to work overtime, and that he was working too much
12 overtime. Id. at 100:17-19, 103:8-25. He does not recall anyone
13 specifically telling him not to record the time he spent working
14 for the company. Id. at 110:11-15. Altamirano was required to
15 have a minimum number of deals in order to continue his
16 employment, and he states that "I had to do what I had to do to
17 generate the business," but he does not recall ever telling anyone
18 at HSBC that he was required to work off-the-clock to generate
19 enough business to stay employed. Id. at 111:1-22. He recalls
20 that there were times when AEs in his branch had to work Saturdays
21 or overtime in order to meet the sales goals set for the area or
22 the branch. Id. at 118:17-25. Jackey Wilson II ("Wilson") worked
23 at the Brea and Cerritos branch. Biela Decl. Ex. I ("Wilson
24 Dep.") at 29:10, 75:13. He testified that at the end of the
25 month, AEs had to stay late to close loans, and that branch

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1 managers were present.⁷ Id. at 183:21-25, 185:3-7. Wilson
2 testified that he was paid his regular wages when he should have
3 been paid time-and-a-half on approximately five occasions. App.
4 of Evidence in Support of Opp'n Ex. D ("Wilson Dep.") at 101:14-
5 102:20.

6 There are a number of aspects of this deposition testimony
7 that undermine its value in showing that Plaintiffs were the
8 victims of a common policy or plan. As noted above, Velasquez's
9 testimony has less probative value because he was no longer
10 employed by Defendants during the time period that would apply to
11 this putative collective action. See Part IV(A), supra.
12 According to Alvarez, she worked off-the-clock only about three or
13 four times, and Wilson worked off-the-clock approximately five
14 times. Almazan's testimony suggests he worked off-the-clock for
15 the sake of trying to acquire bonuses, rather than in a effort to
16 meet mandatory sales quotas. Putting all this evidence together,
17 the Court finds Plaintiffs have not met their light burden of
18 showing they were the victims of a single decision, policy, or
19 plan whereby sales targets were set so high that AEs were required
20 to work overtime without compensation.

21 In an effort to portray AEs' sales targets as strict sales
22 requirements, Plaintiffs also rely on a Performance Improvement
23 Plan issued to Almazan indicating an "[i]nability to perform"
24 during November and December 2006. Biela Decl. Ex U.
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26 ⁷ Although Plaintiffs' Memorandum quotes from Wilson's
27 deposition, Mem. of P.& A. at 7, the page containing the quotation
is not included in the exhibits Plaintiffs filed with the Court.

1 ("Performance Improvement Plan"). However, in his deposition,
2 Almazan explained this performance review as due to the fact that
3 he had just returned from an eight-to-ten week leave of absence.
4 App. of Evidence in Support of Defs.' Opp'n ("Almazan Dep.") at
5 151:2-21. Almazan did not explain the poor review as due to the
6 fact his sales targets were too high, and he explicitly testified
7 that he was never told by a branch manager or district sales
8 manager not to record all of his time. Id. at 156:2-7.

9 The evidence submitted by Plaintiffs does not show that
10 Plaintiffs were sufficiently similarly situated such that the
11 Court should authorize that notice be sent to approximately 10,000
12 former AEs around the country. Instead, this evidence from eleven
13 former AEs indicates that they may have individual FLSA claims
14 against Defendants. There is not enough evidence of a company-
15 wide policy that required AEs to meet "mandatory sales targets
16 while keeping overtime expenses to an unrealistic minimum." Reply
17 at 9.

18 **2. Management Incentives**

19 Plaintiffs' second basis for alleging they were similarly
20 situated relies on management incentives to control overtime.
21 Mot. at 9-11. Plaintiffs allege that branch managers, district
22 managers, and regional managers were "incentivized" to control
23 overtime expenses such that AEs regularly had to work off-the-
24 clock. Id. at 9. The management hierarchy consisted of branch
25 sales managers ("BSMs"), district sales managers ("DSMs"),
26 divisional general managers ("DGMs"), and two regional general
27 managers ("RGMs"). Fitzpatrick Dep. at 47:15-50:2. AEs were

1 required to obtain approval from their BSMs before working
2 overtime. Gillan-Myer Dep. at 38:11-24.

3 The Court begins by noting that Plaintiffs provide no
4 evidence showing that the immediate supervisors of AEs, the BSMs,
5 received bonuses tied to overtime expenses. Instead, Plaintiffs
6 present evidence showing that DSMs could receive a small bonus
7 based, in part, on controlling the amount of overtime within the
8 district. Barden Dep. at 51:5-20; Biela Decl. Ex. T ("2008
9 Incentive Compensation Plan") at HSBC0001970, Fitzpatrick Dep. at
10 75:10-17. Plaintiffs also point out that RGMs were eligible for a
11 large bonus based on a number of business metrics including
12 "profit measures, employee engagement results, insurance results,
13 loan account growth, productivity, expenses and employee
14 recruitment development." Gillan-Myer Dep. at 104:21-106:3.

15 Based on this evidence, Plaintiffs want the Court to conclude
16 that AEs were subjected to a common policy or practice requiring
17 them to work overtime without compensation. The evidence
18 regarding bonuses for district and regional managers is simply
19 insufficient for the Court to conclude that management was
20 "incentivized" on a company-wide basis to deny AEs overtime
21 compensation. While the declarations and deposition testimony of
22 former AEs submitted by Plaintiffs show that there were occasions
23 when AEs worked overtime without compensation, the evidence
24 regarding management bonuses is too tenuous to suggest that these
25 instances were the result of a common, company-wide policy or
26 plan.

27 Many of the Plaintiffs in this case acknowledged that there
28

1 were occasions when they were paid overtime compensation. See
2 App. of Evidence in Support of Defs.' Opp'n Ex. B ("Alvarez Dep.")
3 at 55:11-15 (Alvarez thinks he was paid overtime at HSBC), Ex. C.
4 ("Altamirano Dep.") at 105:11-13, Ex. E ("Alamazon Dep.") at 157:4-
5 11, Ex. F ("Walters Dep.") at 87:15-89:15, Ex. G ("Carney Dep.")
6 at 68:18-24, Ex. H ("Klingensmith Dep.") at 42:2-7. This evidence
7 weakens the allegation that management was incentivized to deny
8 overtime compensation.

9 Finally, Plaintiffs present evidence that Defendants' Human
10 Resources Department investigated complaints by AEs that
11 management was requiring them to work off-the-clock. Mem. of P.&
12 A. at 13; Biela Decl. Exs. AA, BB, DD, EE, and FF. To the extent
13 that management knew it could be subject to such an investigation,
14 this evidence also weakens Plaintiffs' allegations regarding
15 management incentives to deny overtime compensation.

16 **D. Other Cases**

17 In support of their motion for conditional certification,
18 Plaintiffs rely on this Court's rulings in other cases. These
19 cases are distinguishable. In Beauperthuy v. 24 Hour Fitness USA,
20 Inc., this Court conditionally certified a class of personal
21 trainers who alleged they were required to work overtime without
22 compensation. No. 06-0715, 2008 WL 793838, at *1 (N.D. Cal. Mar.
23 24, 2008). In that case, the trainers alleged that their payroll
24 system set strict quotas on the number of floor time hours each
25 employee could record so that the total hours per week never
26 exceeded forty. Id. at *3. Here, the allegations of a common
27 policy or plan are less clear, based on sales targets and

1 management incentives. Unlike the plaintiffs in Beauperthuy, many
2 of the Plaintiffs in this case were sometimes paid overtime
3 compensation. See Part IV(C)(2), supra. Furthermore, in
4 Beauperthuy, the defendants did not offer a single declaration
5 from a 24 Hour Fitness employee stating that the company followed
6 its written rules, or otherwise contradicting the trainers'
7 declarations. Id. at *4. Here, Defendants have presented eighty-
8 three declarations from their employees in support of their
9 opposition. See Part IV(C)(1), supra.

10 Plaintiffs also rely on this Court's decision in Gilbert v.
11 Citigroup, Inc., No. 08-0385, 2009 WL 424320 (N.D. Cal. 2009). In
12 that case, there were allegations that employees were both
13 misclassified as exempt, and they were required to work off-the-
14 clock after they had been reclassified as non-exempt employees.
15 Id. at *1. Based on Citigroup's decision to reclassify the
16 plaintiffs, the Court found there were sufficient allegations of a
17 common policy or plan to warrant conditional certification. Id.
18 at *2-3. In this case, the evidence presented to the Court does
19 not support the inference that Plaintiffs who worked overtime
20 without compensation were the victims of a single decision,
21 policy, or plan. The Court finds no inconsistency between its
22 prior decisions in Beauperthuy and Gilbert, and its current
23 determination that conditional certification is not warranted.

24 Finally, the Court notes that it should not consider the
25 merits of Plaintiffs' claims at the conditional certification
26 stage. Madden v. Corinthian Colleges, Inc., No. 08-6623, 2009 WL
27 4757269 (N.D. Ill. Dec. 8, 2009) at *3; Mowdy v. Beneto Bulk

1 Transp., No. 06-5682, 2008 WL 901546, at *6 (N.D. Cal. Mar. 31,
2 2008); Centurioni v. City and County of San Francisco, 2008 WL
3 295096, at *2 (N.D. Cal. Feb. 1, 2008). Here, the Court has not
4 considered the merits of Plaintiffs' claims that they were
5 required to work overtime without compensation in violation of the
6 FLSA. Instead, the Court has focused almost exclusively on the
7 evidence submitted by Plaintiffs in support of their Motion for
8 Conditional Certification. Based on the evidence submitted
9 concerning the experiences of former AEs, and based on the sparse
10 evidence submitted to support Plaintiffs' contentions relating to
11 sales targets and management incentives, it is simply too much of
12 a stretch for the Court to conclude that approximately 10,000
13 former AEs were the victims of a single decision, policy or plan
14 to deprive them of overtime compensation. See Thompson v.
15 Speedway SuperAmerica LLC, No. 08-1107, 2009 WL 130069, at *2, *8,
16 *13 (D. Minn. Jan. 20, 2009) (denying conditional certification in
17 case where there was a "dearth of evidence" to support allegations
18 that FLSA violations resulted from a common policy or plan);
19 Simmons v. T-Mobile USA, Inc., No. 06-1820, 2007 WL 210008, at *6
20 (S.D. Tex. Jan. 24, 2007) (denying conditional certification in
21 case where sales staff were required to meet minimum monthly sales
22 quotas and where T-Mobile discouraged supervisors from authorizing
23 sales people to work overtime). The Court finds that Plaintiffs
24 have not succeeded in making a minimal showing that the members of
25 this proposed collective action are similarly situated.

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V. CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Conditional Certification is DENIED. The Court DENIES Plaintiffs' request for Court-Authorized Notice, and the Court DENIES Plaintiffs' request for the production of names and addresses.

IT IS SO ORDERED.

Dated: February 18, 2010

Samuel Lute.

UNITED STATES DISTRICT JUDGE